No. 82-2113

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT D.H. RICHARDSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a criminal defendant whose first trial resulted in a hung jury has a right to have the trial court's determination of sufficiency of the evidence at that trial reviewed on appeal before the commencement of the second trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 702 F.2d 1079.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1983. A petition for rehearing was denied on April 27, 1983. The petition for a writ of certiorari was filed on June 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the District of Columbia on two counts of distributing a controlled substance, in violation of 21 U.S.C. 846, and one count of conspiring to commit that offense, in violation of 21 U.S.C. 841(a)(1). At the close of the government's case and immediately before the case was submitted

to the jury, the district court denied petitioner's motion for judgment of acquittal. The jury acquitted petitioner on one of the substantive counts but was unable to reach a verdict on the two remaining counts. The court declared a mistrial and scheduled retrial, whereupon petitioner renewed his motion for judgment of acquittal, and in addition moved to bar retrial on double jeopardy grounds. The district court denied these motions and petitioner appealed. The court of appeals dismissed petitioner's appeal for lack of jurisdiction (Pet. App. 1a-31a).

1. The evidence at trial showed that in September and October of 1980, petitioner was the source of two purchases of heroin made by Special DEA Agent John Lee from Leroy Cooper.

On September 21, Agent Lee made arrangements with Cooper to purchase narcotics the next day (I Tr. 29-30). When on September 22 Cooper arrived at the barbershop where he worked, he told Lee he had to go get the package (*id.* at 72). Lee got into Cooper's car and they drove away (*id.* at 30). When the car stopped, Lee gave Cooper $5,000 and Cooper got out of the car (*id.* at 32). In the meantime Lee went to a telephone booth and called his office (*id.* at 32-33). Moments later an agent saw Cooper get out of a dark color Mercury Cougar convertible (*id.* at 123). Cooper returned to the car where Lee was waiting and said his source was curious why Lee had used the telephone (*id.* at 33). Cooper then gave Lee a package containing about two ounces of 31% pure heroin (*id.* at 33-34, 188).

Between September 22 and October 21, Agent Lee made one additional purchase of heroin from Cooper (*id.* at 190). When Lee telephoned Cooper on October 20, Cooper said he knew that Lee's last purchase was of poor quality but that the next purchase would be from the same source as the heroin Lee bought on September 22 (*id.* at 190-191).

On October 21, Cooper told Lee that his source would bring the heroin to the shop, which was under video-tape surveillance, as soon as Cooper placed the order (*id.* at 191-192). About a half-hour later, petitioner drove up to the shop in a dark blue Mercury Cougar convertible with the same license tag number as the car involved in the September 22 transaction (II Tr. at 7-8). Petitioner got out of the car, spoke to Cooper, and drove away (*id.* at 8).

When Agent Lee returned to the barbershop, Cooper told him that his source had sensed the presence of police and that they would have to drive to another location (I Tr. 192-193). Lee and Cooper drove to that location, where Lee gave Cooper $2,500 (*id.* at 44-45). In the meantime, petitioner was observed by another agent getting into a yellow Buick occupied by Wesley McCray (II Tr. 9-10). After a second change of locations petitioner got out of the Buick and McCray drove the car to the 800 block of P Street, where he met Cooper (I Tr. 280-281). Two or three minutes later Cooper returned to Lee's car and gave Lee a plastic bag containing more than an ounce of 30% pure heroin (*id.* at 189). Petitioner's fingerprint was recovered from the bag (*id.* at 106, 113-114).

2. The jury acquitted petitioner on the substantive count relating to the September 22 distribution and failed to reach a verdict on the other two counts. Thereafter, petitioner unsuccessfully moved for judgment of acquittal and to bar retrial on the ground that the evidence regarding the counts on which the jury was hung had been insufficient to support a conviction. Petitioner appealed from the district court's denial of his motion, and the court of appeals dismissed for want of jurisdiction.

The court of appeals noted that its "ability to rule on [petitioner's] double jeopardy claim in any meaningful manner * * * depends on the appealability of the trial

court's ruling on the sufficiency of the evidence" (Pet. App. 3a). Since the trial court's order was not a final judgment within the strict meaning of 28 U.S.C. 1291, petitioner's insufficiency claim could be reviewed only if it fell within the collateral order exception first recognized in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The court of appeals held (Pet. App. 5a-6a) that the district court's ruling failed to meet the requirements of the *Cohen* exception in two respects. First, the court held that the legal sufficiency of the evidence is "a completely non-collateral issue," since "the ultimate question in a criminal trial is whether the defendant is guilty of the crime charged" (*id.* at 5a). Second, the court found that the right to appellate review of the issue would not be lost if immediate review was denied because respondent could raise the issue when appealing his conviction following his second trial (*id.* at 5a-6a). Hence, the court concluded that petitioner had "failed to make *at this time* any double jeopardy claim which can be reviewed by an appellate court" (Pet. App. 9a) (emphasis in original).[1]

ARGUMENT

1. Petitioner contends that, under *Abney* v. *United States*, 431 U.S. 651 (1977), and *Burks* v. *United States*, 437 U.S. 1 (1978), he was entitled to immediate appellate review, prior to retrial, of the sufficiency of the prosecution's evidence in his first trial, in order to avoid being placed in double jeopardy. Recognizing that the district

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[1]Judge Scalia, in dissent, concluded that the court of appeals had jurisdiction under 28 U.S.C. 1291, but that there can be no double jeopardy violation where, as here, no court or jury had found the evidence at the first trial insufficient (Pet. App. 20a). While based on a different rationale, Judge Scalia's view leads to the same conclusion: appellate courts cannot review sufficiency of the evidence claims on interlocutory appeal.

court's order was not final in the sense that it terminated the proceedings, petitioner relies upon the "collateral order" doctrine first recognized in *Cohen* v. *Beneficial Industrial Loan Corp., supra*, as applied in *Abney*.

Abney concerned the appealability of a motion to dismiss based on what might be termed pure double jeopardy grounds. The defendants in *Abney* claimed that the jury's verdict in their first trial, reversed on appeal, could be read as an acquittal on charges brought against them in their second trial. The sole issue for the appellate court was the legal effect of the verdict in the first trial on the permissibility of a second trial.

Petitioner would expand the reach of *Abney* to cases involving a mistrial or the grant of a new trial, to permit the interlocutory review of any issue that might have justified a judgment of acquittal in the first trial. Since counsel for the defense ordinarily makes a motion to acquit for insufficiency of the evidence as a matter of course, petitioner's theory would in practice guarantee a right of interlocutory appeal, with attendant delay, in almost every prosecution in which there is a mistrial.[2]

The statutory policy against piecemeal appellate litigation is particularly pertinent to petitioner's claim. Under petitioner's theory, proceedings in the trial court would be postponed for the duration of the appellate court's plenary review — a consequence "especially inimical to the effective and fair administration of the criminal law" (*DiBella* v.

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[2]If interlocutory appeals were permitted in cases of this kind, the delay introduced in criminal prosecutions would be substantial. In the present case, 22 months already have elapsed since the district court declared a mistrial and set the case for retrial. Still more time will elapse before this Court can act on the petition for certiorari. Petitioner's interlocutory appeal has thus resulted in substantial disruption of the proceedings in the district court.

United States, 369 U.S. 121, 126 (1962); see also *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940)). Appellate courts would be required in every case to analyze the elements of the charges against the defendant, sift through the trial transcript, review evidentiary exhibits, and decide whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. Unlike the claim in *Abney* (431 U.S. at 662-663), it would not be possible in most cases involving an insufficiency claim to use summary procedures or to determine the merits of the claim on the basis of the indictments and prior judgments.[3] Under petitioner's theory, appellate judges would delve deeply into the factual intricacies of each case, only to be forced to duplicate the process if the accused is retried and convicted.[4] Appellate courts would be denied the economies and enhanced insight that flow from unitary review of all claims of error in a single proceeding. Petitioner's theory thus runs counter to one of the basic purposes of the final judgment rule — to prevent "an unjustified waste of scarce judicial resources"

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[3]The decision in *Abney* was predicated in part on the expectation that the problem of dilatory appeals could be "obviated by rules or policies giving such appeals expedited treatment" (431 U.S. at 662 n.8). This expectation may be realistic where the appellant raises a pure double jeopardy claim based on interpretation of a prior judgment, susceptible to rapid appellate review. Where determination of the appellant's claim requires plenary review of the earlier proceeding, the expectation does not hold.

[4]The duplication of effort at the appellate level is doubly a cause for concern since in every instance the trial judge, who is presumptively the most familiar with the charges and evidence in the case, will have already considered and rejected the claim of insufficiency. As this Court has observed, "[p]ermitting piecemeal appeals would undermine the independence of the district judge," since one purpose of the final judgment rule is to "emphasize[] the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial" (*Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981)).

(*Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 378 (1981); see *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974)).

Abney does not compel the conclusion that a claim of insufficiency of the evidence, however inappropriate for interlocutory review in other contexts, is appealable after a mistrial merely because it is linked to a double jeopardy claim. As this Court said in *United States* v. *MacDonald*, 435 U.S. 850, 857 n.6 (1978): "[A] federal court of appeals is without pendent jurisdiction over otherwise nonappealable claims even though they are joined with a double jeopardy claim over which the appellate court does have interlocutory appellate jurisdiction." This Court made clear in *Abney* that the double jeopardy claim was appealable because it satisfied the criteria for the "collateral order" exception, as set forth in *Cohen*. The Court carefully considered the *Cohen* factors (431 U.S. at 658-662) and concluded that the order rejecting a claim of double jeopardy satisfied all three. A similar analysis was followed in *MacDonald* (435 U.S. at 856-861), to an opposite conclusion.

As the court of appeals concluded (Pet. App. 5a), the order in this case was not "collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged" (*Abney, supra*, 431 U.S. at 659).[5] It is not,

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[5]We acknowledge that the district court's denial of petitioner's motion to dismiss had the requisite conclusiveness — that it did not leave the issue "open, unfinished, or inconclusive" (*Cohen*, 337 U.S. at 546). Under the apparent compulsion of *Abney's* reasoning, we will also assume, though the court of appeals concluded otherwise (Pet. App. 5a), that the order below "involved an important right which would be 'lost, probably irreparably,' if review had to await final judgment" (*Abney, supra*, 431 U.S. at 658, quoting *Cohen, supra*, 337 U.S. at 546). It is nevertheless worth noting that the reversal of any conviction obtained at the retrial on the ground that the evidence at the first trial was legally insufficient would afford the petitioner substantial and valuable relief, even if it does come too late to avoid the retrial itself.

therefore, appealable prior to final judgment.[6] The district court's ruling that the government had presented sufficient evidence to justify a finding of guilt is a classic example of a pretrial order that is "enmeshed in the factual and legal issues" to be resolved during the trial on the merits (*Firestone Tire & Rubber Co.* v. *Risjord, supra*, 449 U.S. at 377). Rather than being "completely independent of [the issue of] guilt or innocence" (*Abney, supra,* 431 U.S. at 660), the challenged order relates directly and exclusively to the merits of the prosecution. As the Fifth Circuit explained in *United States* v. *Rey*, 641 F.2d 222, 225, cert. denied, 454 U.S. 861 (1981) (quoting *United States* v. *Becton*, 632 F.2d 1294, 1296 (5th Cir. 1980), cert. denied, 454 U.S. 837 (1981)):

> These * * * claims of insufficient evidence * * * cannot be resolved in this appeal. "Although in form the question presented here is that of denial of a motion asserting double jeopardy, in reality and substance the appellants seek review of their motions to acquit made at the first trial." * * *
>
> Denials of motions to acquit are not interlocutorily appealable because, being nothing more than a motion for directed verdict, they are not collateral to the merits but are instead "precisely directed" to them. * * * The second element of the collateral order test is thus not met.

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[6]The district court's order is also nonappealable for another reason. This Court noted in *Nixon* v. *Fitzgerald*, No. 79-1738 (June 24, 1982) slip op. 9-10 that "[a]s an additional requirement, *Cohen* established that a collateral appeal of an interlocutory order must 'present[] a serious and unsettled question' " (quoting *Cohen, supra*, 337 U.S. at 547). The insufficiency of the evidence claim in this case is obviously not a "serious and unsettled question" and thus does not justify immediate appellate review.

The decisive character of this prong of the analysis is borne out by *Abney* itself.[7] In addition to its holding on double jeopardy claims, the Court held that a defendant could *not* obtain interlocutory review of a pretrial order sustaining an indictment, even though delaying review could result in putting the accused through the ordeal of an unwarranted trial (*id.* at 663):

> [A]n order denying a motion to dismiss an indictment for failure to state an offense is plainly not "collateral" in any sense of that term; rather it goes to the very heart of the issues to be resolved at the upcoming trial.

The court of appeals was therefore correct in rejecting petitioner's argument that the principle of *Abney* should be extended to permit appeal of the district court order.[8] Like a pretrial order sustaining an indictment, the order in this case "goes to the very heart of the issues to be resolved at the upcoming trial."

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[7]Petitioner relies heavily (Pet. 4-6) on language in the *Abney* opinion stressing that the Double Jeopardy Clause guarantee against being put twice to trial for the same offense would be undermined if the accused were not permitted an appeal before the second trial. But this section of the *Abney* opinion was addressed solely to the third prong of the *Cohen* analysis —whether the decision sought to be reviewed involved an important right which could be "lost, probably irreparably," if review had to await final judgment (*Abney, supra,* 431 U.S. at 658, 660-662). The Court concluded that this requirement was satisfied. Nonetheless, the Court independently considered the remaining *Cohen* factors as well.

[8]This analysis of *Abney* is bolstered by the three court of appeals decisions cited by the Court in support of its holding, (431 U.S. at 657). *United States* v. *Barket*, 530 F.2d 181 (8th Cir. 1975), cert. denied, 429 U.S. 917 (1976), like *Abney*, involved the pure double jeopardy issue of the effect of a final judgment in the first trial upon reprosecution on a similar charge in the second trial. *United States* v. *Beckerman*, 516 F.2d 905 (2d Cir. 1975), and *United States* v. *Lansdown*, 460 F.2d 164 (4th Cir. 1972), involved an issue completely "separable from, and collateral to" the question of guilt or innocence — whether the trial court erroneously caused a mistrial by too hastily declaring the jury

Nor does *Burks* v. *United States* support a contrary conclusion. This Court in *Burks* simply held that an appellate court's finding that prosecution evidence was insufficient to support a conviction is functionally identical to a trial court's finding, and should have the same effect — a judgment of acquittal. A judgment of acquittal, of course, bars retrial under the Double Jeopardy Clause. In the Court's words (437 U.S. at 11; emphasis in original):

> [I]t should make no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient * * *. The appellate decision unmistakably meant that the District Court had erred in failing to grant a judgment of acquittal. To hold otherwise would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court.

Burks did not address the *timing* of appellate review or interpret the final judgment requirement of 28 U.S.C. 1291.[9] It merely established that a finding of insufficiency of the evidence, *whenever it occurs,* constitutes a judgment of acquittal and bars retrial. No such finding has been made by a court in this case.

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deadlocked. None of these lower court decisions cited by the *Abney* Court involved claims, such as insufficiency of the evidence, that "go[] to the very heart of the issues to be resolved at the upcoming trial" (*Abney, supra,* 431 U.S. at 663). Indeed, in *United States* v. *Lansdown, supra,* 460 F.2d at 171 n.8, the Fourth Circuit carefully distinguished the case from another in which the motion to dismiss on double jeopardy grounds would be more closely intertwined with the merits of the case.

[9]The question of appellate jurisdiction is purely a matter of statutory construction. The Double Jeopardy Clause itself creates no right of appeal. *Abney, supra,* 431 U.S. at 656; see *Heike* v. *United States,* 217 U.S. 423, 428 (1910).

Petitioner is not entitled to an immediate appeal merely because an appellate finding of insufficiency, if it were made now, would have the effect under the Double Jeopardy Clause of sparing him retrial. Rather, this case presents the common, if lamentable, situation in which the accused must bear "the discomfiture and cost of a prosecution" before his claim may properly be "reconsider[ed] by an appellate tribunal." *Cobbledick* v. *United States, supra*, 309 U.S. at 325-326. Every court of appeals that has considered the issue in this procedural context has reached this conclusion, and this Court has denied certiorari in three such cases. *United States* v. *Ellis*, 646 F.2d 132, 134-135 (4th Cir. 1981); *United States* v. *Becton*, 632 F.2d 1294, 1297 (5th Cir. 1980), cert. denied, 454 U.S. 837 (1981); *United States* v. *Carnes*, 618 F.2d 68, 70 (9th Cir.), cert. denied, 447 U.S. 929 (1980); *United States* v. *Young*, 544 F.2d 415, 416 (9th Cir.), cert. denied, 429 U.S. 1024 (1976).

Petitioner asserts (Pet. 3-4), and the court below agreed (Pet. App. 6a-8a), that the Third Circuit's decision in *United States* v. *McQuilkin*, 673 F.2d 681 (3d Cir. 1982), is in conflict with the court of appeals' decision in this case and the other circuit court decisions cited above. However, *McQuilkin* is distinguishable. The defendants in *McQuilkin* were convicted by a magistrate of contempt of an injunctive order. The district court, acting in an appellate capacity, reversed and scheduled a retrial before a jury, while rejecting the defendants' claim that the evidence before the magistrate was insufficient. *McQuilkin*, like *United States* v. *Sneed*, 705 F.2d 745 (5th Cir. 1983), *United States* v. *Marolda*, 648 F.2d 623 (9th Cir. 1981), *United States* v. *Jelsma*, 630 F.2d 778 (10th Cir. 1980), and *United States* v. *United States Gypsum Co.*, 600 F.2d 414 (3d Cir.), cert. denied, 444 U.S. 884 (1979), thus involved the problem of

the timing of subsequent appeals *after an initial final judgment of conviction has been entered.*[10]

Whatever the merits of these decisions, their impact on judicial economy and the administration of justice is considerably less than would be caused by a right of interlocutory appeal here, where there has been no judgment in the trial court and no involvement by an appellate court in the process. In cases such as *McQuilken* and *Sneed*, the appellate court can minimize the delay and burden by addressing the question of evidentiary sufficiency as part of the first appeal. Compare *Sneed, supra* (second appeal permitted before retrial to consider insufficiency claim), with *United States* v. *Bizzard*, 674 F.2d 1382, 1386 (11th Cir.), cert. denied, No. 82-5010 (Nov. 1, 1982) (presuming that appellate court decides insufficiency claim, if raised, on initial appeal). By contrast, a right of appeal in the instant case would interfere with the ability of trial courts to schedule prompt retrials. In addition, the entry of an initial final judgment is of particular significance under the reasoning of *Abney* since the principal issue in double jeopardy cases (*e.g., Tibbs* v. *Florida*, 457 U.S. 31 (1982); *Hudson* v. *Louisiana*, 450 U.S. 40 (1981); *Greene* v. *Massey*, 437 U.S. 19 (1978); *Abney* v. *United States, supra*) is the effect of an earlier *judgment* on the permissibility of retrial.

In sum, while the aforementioned decisions may give reason to anticipate that a conflict among the circuits on the issue presented by this case may some day emerge, no such

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[10]We do not contend that the *reasoning* of these decisions is consistent with that of the court of appeals in the instant case, but that the *holdings* create no conflict. Indeed, as is apparent from the *Sneed* opinion's treatment of the *Becton* and *Rey* decisions (705 F.2d at 747), these two lines of cases have been able to coexist in the Fifth Circuit.

conflict now exists, and there is accordingly no need for review by this Court at the present time.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11]If this Court were to grant review, it presumably would limit its consideration of the case to the appealability issue. If it then found the evidentiary sufficiency claim to be appealable, we assume it would remand to the court of appeals to consider the merits of that claim, which presents no issue independently worthy of this Court's consideration at the present time. We accordingly do not address the merits of the sufficiency issue, although we note our belief that this issue was correctly decided by the district court.

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